BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

At the trial of this cause, the evidence showed that the plaintiff in the court below was engaged in the transportation of dairy products in interstate commerce and their distribution to the retail trade in Miami.

At the time the plaintiff's truck and trailer were struck by the defendants' switch engine, they were coming into Miami from Binghamton, New York, loaded with dairy products intended for the retail trade.

The defendants were engaged in the transportation of goods and passengers by railroad in interstate and intrastate commerce.

At the time their switch engine collided with the plaintiff's truck and trailer, it was returning from the delivery of a car on an industrial track of a consignee.

Therefore, the parties were engaged in identically the same business and, in their operations, each used heavy self-propelled vehicles.

The railroad operated its equipment on its own tracks but across public highways. The plaintiff operated its equipment upon public highways where it came in contact with vehicles driven by the public generally.

The defendants were operating the switch engine in conformity with law. The plaintiff's truck (weighing 42,000 pounds with cargo) was being operated in violation of State statutes that restricted the rate of speed of vehicles of that size and weight in cities and towns.

In spite of the fact that the parties were engaged in exactly the same kind of business, that they used like instrumentalities in their businesses and their methods of operation were similar in all substantial respects, when the two vehicles came together, the statutes under attack created a presumption that the railroad was negligent from the

sheer fact that its train collide led with the truck. There was
no presumption against the p plaintiff.

And the statute further prov vided that if both parties were
at fault, that is to say, that if th the plaintiff were guilty of con-
tributory negligence, it could s still recover but its damages
would be diminished in propor rtion to its fault.

If the procedural situation ha had been reversed and the rail-
road had sued the truck line fo for the damage to its locomo-
tive, there would have been no o presumption that the truck
line was negligent. It would ha have been a matter of affirma-
tive proof on the part of the pla plaintiff as in other civil cases.
And furthermore, in such a cas ase, if the evidence had shown
that the plaintiff-railroad was s guilty of any contributory
negligence, however slight, it v would have barred recovery
absolutely.

Carter v. *J. Ray Arnold L Lbr. Co.* (1922), 83 Fla. 470,
91 Sou. 893;

General Outdoor Advertisi ising Co. v. *Frost* (1935), (C.
C. A. 5th), 76 F. (2d) 127 27.

If a pedestrian standing at or or near the crossing had been
injured when this collision oc occurred he could have sued
the railroad and the motor carr rrier as joint tortfeasors in a
single action. If his evidence e merely disclosed the fact of
his injury and nothing more, the he motor carrier would be dis-
charged under a directed verdic dict, but the co-defendant rail-
road would have to overcome th the presumption of negligence
or suffer a verdict against it. t.

If the evidence disclosed tha hat the pedestrian negligently
contributed to his injuries, the e motor carrier would still be
entitled to a directed verdict i t in its favor, while the rail-
road would be liable.

In the instant case, the verd erdict of the jury clearly evi-
dences its conclusion that the m motor carrier was two-thirds
to blame for the accident. (T (The challenged statute calls

for diminution of damages in the proportion that the plaintiff's negligence bears to the combined negligence of both parties.) Therefore, without the aid of the statute, the motor carrier could have recovered nothing.

The Supreme Court of Florida has held repeatedly that the constitutional basis for discriminating against railroads by these statutes was the dangerous character of the business conducted by them.

Grace v. *Geneva Lumber Company* (1916), 71 Fla. 31, 70 Sou. 774.

Having first recognized that an automobile is more dangerous than a railroad train because the latter moves along the path fixed by its rails, while the course of the automobile cannot be forecast,

Southern Cotton Oil Co. v. *Anderson* (1920), 80 Fla. 735, 86 Sou. 629

the Florida Court finally committed itself to the proposition that the automobile was the most deadly machine in America.

Crenshaw Brothers Produce Co. v. *Harper* (1940), 142 Fla. 27, 194 Sou. 353.

This Court has said that the railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation.

N., C. & St. L. Railway v. *Walters* (1935), 294 U. S. 405, 55 Sup. Ct. 486, 79 L. Ed. 949.

The Court thereupon held that a statute of Tennessee, authorizing the imposition upon railroads of part of the expense of constructing an underpass at a grade crossing, although valid when enacted and admittedly to promote public safety, had become invalid by change in the conditions to which it applied.

On December 2, 1941 the Supreme Court of Florida declared invalid a statute (passed in 1899) requiring railroads to fence rights of way under penalty of double damages for the killing of livestock. It followed the decision of this Court in the *Walters* case, *supra,* and upon its authority held the statute unconstitutional by reason of changed conditions. The Court pointed to the manifest discrimination of not only penalizing the railroad with double damages but, in addition, forcing it to defend under the burden of a presumption of negligence, whereas a motor carrier killing the same cow in the same locality was subject to neither penalty nor presumption. It said there could be no question but that motor carriers and railroads were under like duties to the public and had like obligations to protect against accidents arising out of their operations.

Atlantic Coast Line R. v. *Ivey,* 148 Fla. —, 5 Sou. (2d) 244.

It is impossible to reconcile that holding with that in the case at bar.

In the instant case, the trial judge, based on the statutes under attack, told the jury that the railroad was presumed to be negligent unless it made it appear affirmatively that it had exercised all ordinary and reasonable care and diligence and, in the absence of such showing on the part of the railroad, it should find for the plaintiff.

His Honor further told the jury that even though it found that the plaintiff's employees were guilty of negligence and that their negligence proximately contributed to the plaintiff's loss, nonetheless it was authorized to find for the plaintiff (unless the defendant made it appear affirmatively that it had exercised all ordinary care) but that the amount of the verdict should be diminished in proportion to the fault attributable to each.

In these circumstances, it was expecting too much for a lay jury to do other than it did.

The jury must have found that the railroad did not meet the burden that the court put upon it. It clearly found that the driver of the truck was primarily responsible; otherwise, there was no occasion for reducing the damages by two-thirds.

The railroad objected to these charges upon the ground that the statutes upon which they were predicated were repugnant to the Constitution of the United States. On appeal, after the rendition of judgment for the motor carrier, the giving of these charges was assigned as error in the Supreme Court of Florida, but that Court upheld the validity of the statutes upon which the charges were based, approved the giving of the charges, and affirmed the judgment of the Dade County Court.

The statutes clearly deny the petitioners the equal protection of the laws and deprive them of their property without due process of law in violation of Article XIV of the Amendments to the Constitution of the United States and the Supreme Court of Florida should have so found and reversed the Circuit Court of Dade County.

Respectfully,

RUSSELL L. FRINK,
ROBERT H. ANDERSON,
Counsel for Petitioners.